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Sup. Ct.

**TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1945**

~~46~~ 47

**No. 636**

~~333~~

**MURRAY WINTERS, APPELLANT,**

**vs.**

**THE PEOPLE OF THE STATE OF NEW YORK**

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**APPEAL FROM THE COURT OF SPECIAL SESSIONS OF THE CITY OF  
NEW YORK, STATE OF NEW YORK**

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**FILED DECEMBER 3, 1945.**

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 636

MURRAY WINTERS, APPELLANT,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF SPECIAL SESSIONS OF THE CITY OF  
NEW YORK, STATE OF NEW YORK

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[fol. 1]

**IN SUPREME COURT OF NEW YORK, APPELLATE  
DIVISION, FIRST DEPARTMENT**

PEOPLE OF THE STATE OF NEW YORK, Respondent,

against

MURRAY WINTERS, Defendant-Appellant

**STATEMENT**

On December 2nd, 1942 an information was filed accusing the above named defendant of violating Section 1141 of the Penal Law.

On December 9th, 1942 the defendant pleaded not guilty.

On January 19th, 1943 after trial the defendant was convicted of the violation of Subdivision 2 of Section 1141 of the Penal Law on Counts 4 and 5 of said information.

On January 27th, 1943 judgment of conviction was pronounced on the defendant and the defendant was sentenced to a fine of \$100 or 30 days in the City Prison.

Gilbert S. Rosenthal appeared for the defendant on the trial, and Arthur N. Seiff appears for him on this appeal.

Hon. Frank S. Hogan, District Attorney, New York County, appeared for the People of the State of New York throughout the proceedings herein.

There has been no change of parties or attorneys, except as above stated.

[fol. 2] IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW  
YORK, COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Complainant,

against

MURRAY WINTERS, Defendant

**NOTICE OF APPEAL**

SIRS:

Please Take Notice that the defendant herein hereby appeals to the Appellate Division of the Supreme Court in and for the First Department from the judgment of



conviction rendered against him in this Court on the 27th day of January 1943, of the crime of possessing with intent to sell magazines in violation of Subdivision 2 of Section 1141 of the Penal Law and fining him the sum of \$100 or sentencing him to thirty days in default of payment of such fine, and that this appeal is from each and every part of said judgment of conviction as well as from the whole thereof, on both questions of law and fact.

Dated, New York, February 24th, 1943.

Yours, &c., Arthur N. Seiff, Attorney for Defendant,  
Office & P. O. Address, No. 570 7th Avenue,  
Borough of Manhattan, New York City.

[fol. 3] To: Clerk of Court of Special Sessions, New York County.

To: Hon. Frank A. Hogan, District Attorney, New York County.

IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK,  
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

against

MURRAY WINTERS, Defendant

#### INFORMATION

Be It Remembered that I, Frank S. Hogan, the District Attorney of the County of New York, by this information, accuse the above-named defendant of the Crime of Unlawfully Possessing Obscene Prints, committed as follows:

The said defendant, on the 10th day of August, 1942, at the City of New York, in the County of New York, with intent to sell, lend, give away and show, unlawfully did have in his possession a certain obscene, lewd, lascivious, filthy, indecent and disgusting magazine and pamphlet entitled "Spotlight," whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

[fol. 4]

## Second Count

And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the Crime of Unlawfully Possessing Obscene Prints, committed as follows:

The said defendant, on the day and in the year aforesaid, at the city and in the county aforesaid, with intent to sell, lend, give away and show, unlawfully did have in his possession a certain obscene, lewd, lascivious, filthy, indecent and disgusting magazine and pamphlet entitled "The Model Poses," whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

## Third Count

And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the Crime of Unlawfully Possessing Obscene Prints, committed as follows:

The said defendant, on the day and in the year aforesaid, at the city and in the county aforesaid, with intent to sell, lend, give away and show, unlawfully did have in his possession a certain obscene, lewd, lascivious, filthy, indecent and disgusting magazine and pamphlet entitled "Shadowless Figure Portraiture," whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

## Fourth Count

And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the Crime of Unlawfully Possessing Obscene Prints, committed as follows:

The said defendant, on the day and in the year aforesaid, at the city and in the county aforesaid, with intent to sell, and, give away and show, unlawfully did offer for sale and distribution, and have in his possession with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent and disgusting magazine entitled "Headquarters Detective, True Cases from the Police

Blotter, June 1940", the same being devoted to the publication and principally made up of criminal news, police reports, and accounts of criminal deeds, and pictures and stories of deeds of bloodshed, lust and crime.

### Fifth Count

And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the Crime of Unlawfully Possessing Obscene Prints, committed as follows:

The said defendant, on the day and in the year aforesaid, at the city and in the county aforesaid, with intent to sell, lend, give away and show, unlawfully did offer for sale and distribution, and have in his possession with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent and disgusting magazine entitled "Headquarters Detective, True Cases from the Police Blotter, June 1940", the same being devoted to the publication and principally made up of criminal news, police reports, and accounts of criminal deeds, and pictures and stories of deeds of bloodshed, lust and crime.

Frank S. Hogan, District Attorney.

[fol. 6]

### ENDORSEMENTS ON INFORMATION

Cal. No. 4229

4929

COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK,  
COUNTY OF NEW YORK

THE PEOPLE

VS.

MURRAY WINTERS B

For Sentence.

Information: Obscene Prints. Penal Law, Section 1141.  
Frank S. Hogan, District Attorney. W

Filed Dec 2 1942. Counsel, adjournments Jan 12—1943  
Deft. Jan 19

Witnesses, Harry Kahan, 215 W. 22 St.; Off. Bischoff  
M W H. (See Exhibits in File Room D. A. O.)

Dec 9 1942 Cal. No. Paige  
Defendant Pleads Not Guilty

[fol. 7] Jan 19 1943 Cal No. Cooper Flood Doyle.

On Trial, Defendant Acquitted as to Counts—1-2-and 3.  
Flood J. Dissenting.

On Trial, Defendant Convicted as to Counts 4 and 5.

Defendant continued on Bail for Sentence Jan 27. Of-  
ficer and Record Irving Ben Cooper. Fingerprint Attached.  
Jan 27 1943 Cal. No. 6.

De Luca Cooper Flood

Motion to set aside Conviction and in Arrest of Judg-  
ment Denied.

\$100 Fine or 30 Days City Prison. Paid.

Geo. B. De Luca, Presiding Justice.

Entered in Fine Book Page 150.

[fol. 8] IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW  
YORK, COUNTY OF NEW YORK

Present:—Hon. Cooper, Hon. Flood, Hon. Doyle, Justices

On a Charge of Vio. Penal Law Sec. 1141 (Obscene Prints)

THE PEOPLE OF THE STATE OF NEW YORK

vs.

MURRAY WINTERS

EXTRACT FROM CLERK'S MINUTES—January 19, 1943

I Do Certify that it appears from an examination of  
the Records of this office that Murray Winters the above-  
named defendant was on trial acquitted as to Counts 1,  
2, and 3, Justice Flood dissenting. On trial, defendant  
convicted as to Counts 4 and 5, on January 19, 1943. De-  
fendant sentenced to pay a fine of \$100. or serve 30 vs  
City Prison by the Court of Special Sessions of The City  
of New York, on the 27th day of January 1943.

Jan 27, 1943: Motion to set aside Conviction and in  
arrest of judgment denied by Justices De Luca, Cooper  
and Flood.

A True Extract From the Minutes

Joseph F. Moss, Clerk of Court. (Seal.) J. C.

[fol. 9] IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK, NEW YORK COUNTY, PART VI

Charge: Obscene Prints, Penal Law, Section 1141

THE PEOPLE OF THE STATE OF NEW YORK

against

MURRAY WINTERS, Defendant

**Transcript of Hearing**

Tried at 100 Centre Street, New York, N. Y., January 19, 1943

Before Hon. Irving Ben Cooper, Presiding Justice, Hon. John V. Flood, Hon. Thomas F. Doyle, Associate Justices

**APPEARANCES:**

For the People: James Fitzpatrick, Esq., Deputy Assistant District Attorney, 155 Leonard Street, New York, N. Y.

For Defendant: Gilbert S. Rosenthal, Esq., 366 Broadway, New York, N. Y.

Michael J. Michell, C. S. R., Official Stenographer.

[fol. 10] Court Clerk: No. 34, Murray Winters.

HARRY KAHAN, called as a witness on behalf of the People, being duly sworn, testifies as follows:

Direct examination.

By Mr. Fitzpatrick:

Q. What is your name?

A. Harry Kahan, agent, New York Society for the Suppression of Vice, 215 West 22nd Street, Borough of Manhattan.

Q. Now, Mr. Kahan, did you see the defendant on August 10, 1942?

A. I did.

Q. Will you state where you saw him and the circumstances under which you met him on that occasion. Tell the Court exactly what happened.



A. On August 10, 1942, about 4.00 P. M., I entered a store located at 712 Broadway, Borough of Manhattan, known as Wehman Brothers, and found this defendant in a store, in that store. I asked him whether he was the owner. He said "Yes." I asked him the name. He said, "My name is Murray Winters." I said, "Isn't your name Wishengrad?" He said, "No my name is Murray Winters." I looked around in the store. I was accompanied at that time by Lieutenant Warshower and Officer Bischoff. I looked around in the store and found on display—

Mr. Rosenthal: I object to that, if the Court please—"on display."

The Court: Objection is sustained.

Justice Cooper: What did you see?

The Witness: Various books, and among them a magazine known as "Spotlight," "The Model Poses," "Shadowless Figure Portraits," and I asked him the price. He said, "The prices are on it." I said, "How much is it?" He said, "Spotlights are sold at ten cent a copy, Model [fol. 11] Poses at eighteen cents, and Shadowless Figure Portraits at \$1.65." A quantity of said Spotlight Figure Portraits were found in the rear of the store covered with bags. They were seized by the police and taken to the Property Clerk's office. Also a quantity, about two thousand copies of Headquarter Detective magazines were found in the cellar; they were also seized by the police. Murray Winters was arrested and taken to the station house.

Q. I show you this booklet and ask you if you saw that in defendant's store on the day in question.

A. That's right.

Mr. Fitzpatrick: I offer this booklet in evidence as People's Exhibit 1.

Mr. Rosenthal: No objection.

Justice Cooper: No objection?

Mr. Rosenthal: No, your Honor.

Justice Cooper: It is received in evidence and physically marked People's Exhibit 1.

(The booklet referred to was admitted in evidence and marked People's Exhibit 1, of this date.)

Justice Cooper: Now, Mr. District Attorney, I would like to suggest, since it isn't clear to me, you might develop the approximate number of pamphlets similar to each one that you will offer in evidence, so that we get the clear picture as we go along.

Q. Now, Mr. Kahan, can you tell us how many copies of People's Exhibit 1 you saw in the defendant's premises on [fol. 12] the day of his arrest?

A. Two hundred and eighty-five.

Justice Cooper: Just where were they, Mr. Kahan? Now, remember we are talking about People's Exhibit 1 only right now.

The Witness: That's right. Two hundred eighty-five copies of Spotlight—no. What is that Spotlight? Of Spotlight. Pardon me. I want to correct that "of Spotlight."

Justice Cooper: Now, wait a minute. Take it easy. No one is rushing you. Wait a minute.

The Witness: One thousand—

Justice Cooper: Take a look at People's Exhibit 1.

The Witness: That's right.

Justice Cooper: Have you got it in front of you?

The Witness: That's right.

Justice Cooper: Now, approximately how many copies similar to People's Exhibit 1 were in the premises that you have described on the day that you went there?

The Witness: One thousand and twenty-eight copies.

Justice Cooper: And where were those 1,028?

The Witness: They were right in the store at 712 Broadway, on the shelf.

Justice Cooper: On the shelf?

The Witness: That's right.

Justice Cooper: All right.

Mr. District Attorney, will you hand that one up, please.

[fol. 13] Mr. Fitzpatrick: Yes, sir.

By Mr. Fitzpatrick:

Q: I show you another booklet and ask you if you saw that booklet in the defendant's premises.

A. I did.

Q. On the day in question?

A. I did.

Q. And let me have it, please.

Mr. Fitzpatrick: I offer in evidence as People's Exhibit 2 a booklet entitled "The Model Poses".

Mr. Rosenthal: No objection.

Justice Cooper: There being no objection, it will be received in evidence and marked People's Exhibit 2 in evidence.

(The booklet referred to was admitted in evidence and marked People's Exhibit 2, of this date.)

Q. Tell us, if you can, please, how many copies of People's Exhibit 2—

A. Eighty-six.

Q. —you saw in the defendant's premises.

A. Eighty-six.

Q. And in what portion of the store, in what place were they?

A. Also in the store on a shelf in said premises located at 712 Broadway, in the Borough of Manhattan.

Q. I show you a magazine and ask you if you saw that magazine in the defendant's store on the day in question.

A. I did.

Mr. Fitzpatrick: I offer this magazine in evidence as People's Exhibit 3.

Mr. Rosenthal: Well, I notice various pencil marks on [fol. 14] this exhibit which I do not believe were on it at the time.

Justice Cooper: Your objection, then, is only as to the pencil marks?

Mr. Rosenthal: That's right, your Honor.

Justice Cooper: The offer of the District Attorney, I presume, is that magazine excluding the pencil marks.

Mr. Fitzpatrick: It is, sir.

Justice Cooper: Do you object to it in that form, in the form of that offer?

Mr. Rosenthal: We have a copy here, your Honor, which is exactly the same without any pencil marks.

Justice Cooper: Show it to the District Attorney.

Mr. Rosenthal: If the District Attorney would—

Justice Cooper: If he wishes to offer that one, it is up to him.

Mr. Rosenthal: Mr. Kahan gave it to me at the time of the arrest of the defendant and it has been in my possession ever since. It is exactly the same.

Mr. Fitzpatrick: As counsel has assured me that it is an exact copy, I will accept that assurance, your Honor.

Justice Cooper: So the prior offer is withdrawn, and in its place is the magazine offered to the District Attorney by counsel for the defendant, which the District Attorney now offers in evidence as People's Exhibit 3, is that right?

Mr. Fitzpatrick: That is correct.

Justice Cooper: Is that right, Mr. District Attorney?

[fol. 15] Mr. Fitzpatrick: That is correct.

Justice Cooper: And you have no objection to that, counsel?

Mr. Rosenthal: No, your Honor.

Justice Cooper: Received in evidence and physically marked People's Exhibit 3 in evidence.

(The magazine referred to was admitted in evidence and marked People's Exhibit 3, of this date.)

Q. Mr. Kahan, can you tell the Court how many copies of People's Exhibit 3 you saw or found in the defendant's premises on the day in question.

A. Two hundred eighty-five copies were found in said store, 712 Broadway, Borough of Manhattan, on a shelf, on an upper shelf of the rear of the store, covered with covers of some kind of a—bags, sacks, or something.

Q. Now, Mr. Kahan, did you find anything else in the premises?

A. I did.

Q. What was that?

A. Headquarter Detectives, two thousand copies, Headquarter Detectives.

Justice Cooper: I am sorry, Mr. District Attorney, how many copies did the witness testify as to People's Exhibit 3?

Mr. Fitzpatrick: Two hundred eighty-five.

Justice Cooper: All right, thank you.

Q. I show you this magazine and ask you if that is one of the magazines you found in the defendant's premises on the day in question.

A. That's right; yes.

[fol. 16] Mr. Fitzpatrick: Any objection to my offering that in evidence as People's Exhibit 4?

Mr. Rosenthal: (No answer.)

Q. Do you know, Mr. Kahan, whether or not there are any marks in the June issue of the magazine I have just exhibited to you? If you don't know, so state.

A. I don't know.

Mr. Fitzpatrick: He doesn't know.

Q. I show you another magazine, officer, and ask you if that is one magazine which you found in the premises of the defendant on the day in question.

A. That's right; that is the same.

Mr. Fitzpatrick: At this time, your Honor, I offer in evidence two magazines entitled "Headquarters Detective"; one is a June issue and one is an August issue, as People's Exhibits 4 and 5, exclusive of any markings which may be contained therein.

Mr. Rosenthal: No objection.

Justice Cooper: Any objection?

Mr. Rosenthal: No objection.

Justice Cooper: There being no objection, they will be so marked in evidence, People's Exhibits 4 and 5.

(The magazines referred to were admitted in evidence and marked People's Exhibits 4 and 5, respectively, of this date.)

Q. I show you People's Exhibit 4 in evidence and ask you how many copies of that issue you found in the defendant's premises on the day in question.

A. I don't know how many of said issue of Headquarter [fol. 17] Detectives were found, but I know that both issues of Headquarter Detectives, for the month of June and the other one, were found two thousand copies.

Q. That is People's Exhibits 4 and 5?

A. That's right.

Q. And where did you find them?

A. In the cellar of said premises located at 712 Broadway, Borough of Manhattan.

Q. Now, Mr. Kahan, did you personally have any conversation with the defendant in connection with People's Exhibits 1 to 5, inclusive, or any of them?

A. Yes, I did.



Q. What was the conversation or conversations?

A. I asked—

Q. Refer to the exhibits specifically, if you can.

A. Exhibit No. what? No. 1?

Q. No. 1 is—

Justice Cooper: Here you are. Show it to him, please.

Q. I show you People's Exhibit 1 and ask you if you had any conversation with the defendant in connection with that.

A. I asked the defendant whether they were for sale. He said, "Yes." I said, "How much?" He said, "Ten cents a copy."

Q. Any further conversation with him?

A. No.

Q. All right. Now, People's Exhibit 2, which I now show you, had you any conversation with the defendant in connection with that?

A. I did. I asked the defendant whether this Model Poses, the magazine, whether this was for sale. He said, "Yes." I asked him how much. He said, "Eighteen cents a copy."

Q. May I have it, please?

[fol. 18] Justice Cooper: By the way, does the District Attorney contend that anything in the literature—by that I mean the printed words—is objectionable, or does the District Attorney direct our attention to the photographs and only the photographs in these various exhibits?

Mr. Fitzpatrick: I direct the Court's attention to the photographs in those exhibits, which appear to be model magazines, so to speak, and I direct the Court's attention to the language in the Detective issues.

Justice Cooper: All right. Those are Exhibits 4 and 5.

Mr. Fitzpatrick: That is true.

Justice Cooper: All right.

Q. Now, in regard to People's Exhibits 3, 4 and 5—

Justice Cooper: Would you mind just asking him about 3, because we are putting 4 and 5 in a different category, because there you say you want us to read the literature or the printed matter, as well as to observe the pictures therein.

Q. Did you have any conversation with the defendant in connection with People's Exhibit 3, which I now show you?

A. I did.

Q. What was that conversation?

A. I asked him whether they were for sale. He said, "Yes". But this is not a copy that was taken in custody.

Q. You mean that is the one—it is the same as that; assume it is.

A. I see.

Q. Did you have any conversation with the defendant in connection with it?

A. I did.

[fol. 19] Q. What was that conversation?

A. I asked him how much they were for sale and he said the price \$1.65.

Justice Cooper: Each?

The Witness: A copy.

Q. Now, Mr. Kahan, did you have any conversation with the defendant in connection with People's Exhibits 4 and 5?

A. I did.

Q. Which are the detective magazines?

A. I did.

Q. And what was that conversation or conversations?

A. I asked him whether they were for sale. He said, "Yes." "How much"? He said, "Fifteen cents a copy." He said, "What do you want to do with them?" I said, "They will be seized by the police." He said, "Why do you have to seize them? I rather take them and destroy them myself. Leave them right here." Then the police took action and seized the 2,000 copies of said magazines, Headquarter magazines.

Justice Cooper: Don't drop your voice, Mr. Kahan. We don't get it. What did you say please?

The Witness: And the police seized two thousand copies of Headquarters magazine, June issue and the other issue.

Justice Cooper: All right.

Mr. Fitzpatrick: Your witness.

## Cross-examination.

By Mr. Rosenthal:

Q. Now, Mr. Kahan, what time of day was it you walked into this store of Mr. Winters?

A. That was August 10, 1942.

Q. What time of the day?

A. Oh, about 4:00 P. M.

[fol. 20] Q. And this store is how large?

A. Oh, about 150 feet long or so; probably longer than that.

Q. About 150 feet long and about 30—

A. One hundred fifty or two hundred feet long.

Q. And about 30 to 35 feet wide, is it not?

A. About that.

Q. Now, none of these exhibits that you have introduced into evidence here today were exhibited in the window of the store, were they?

A. No, sir.

Q. And this store is stacked, is it not, from the floor right to the ceiling, from the front right to the back, with books, magazines, periodicals, various forms of literature?

A. That's right.

Q. Now, where in relation to the store itself did you find these Exhibits, People's Exhibits 1, 2 and 3?

A. One I found in the store as you enter, on the left-hand side; also referring to Exhibit No. 2; and No. 3 was found all the way in the rear of the store on the right-hand side, on the upper shelf covered with bags.

Q. And there were other things covered with bags there, weren't there?

A. Not as far as I know.

Q. Well, you looked through the store pretty thoroughly, didn't you, Mr. Kahan?

A. That's right.

Q. You looked into bins that were on the sides of the walls, didn't you?

A. That's right.

Q. And you saw other periodicals or other publications covered with bags to keep them clean, didn't you?

A. No, sir.

Q. You didn't. This is the only one, People's Exhibit 3, that you saw covered with burlap?

A. That's right.

Justice Doyle: Hold that up.

[fol. 21] Mr. Rosenthal: People's Exhibit 3.

Q. Now, Mr. Kahan, you remember testifying in the Magistrates' Court in this case, don't you?

A. I do.

Q. And do you recall that your testimony in the Magistrates' Court was that you found People's Exhibits 1, 2 and 3 in the rear portion of the store?

A. No, sir.

Q. Well, is that correct or isn't it correct, that they were in the rear portion of the store?

A. Not Exhibit 1 and 2 were not in the rear of the store.

Q. Now, the two hundred—the one thousand and some odd copies, 1,028 copies of People's Exhibit 1, was that in front of the store or the rear of the store?

A. It was right in the middle of the store, on the left-hand side, on a shelf.

Q. On a shelf?

A. That's right.

Q. And People's Exhibit 2, the 86 copies which you claim you found in the premises, where were they?

A. Were also about there.

Q. What?

A. Were also placed around that section.

Q. Now, this store has a partition in it, hasn't it?

A. That's right.

Q. A wooden partition?

A. That's right.

Q. And the front portion of the partition that faces the front of the store has shelving on it, hasn't it?

A. That's right.

Q. And the back part of the partition that faces the rear of the store also has shelving on it?

A. That's right.

Q. And these—that 1,028 copies of People's Exhibit 1, and the 86 copies of People's Exhibit 2, and the 285 copies of People's Exhibit 3 were within that partition facing the rear of the store, were they not?

A. No, sir.

[fol. 22] Q. Now, when you first testified, you told us that the—you told the District Attorney and the Court that you asked the defendant if they were for sale and he told you they were.

A. That's right.

Q. And you asked him the prices and he told you the prices were on them?

A. That's right.

Q. Now, when you first went into the store, didn't you identify yourself?

A. I did.

Q. And you told him who you were with?

A. That's right.

Q. And you didn't offer to purchase anything from the defendant, did you?

A. No, sir.

Q. And the defendant didn't offer to sell you anything, did he?

A. That was his answer when I asked him.

Q. I say, he didn't offer to sell you anything; you asked him if they are for sale?

A. That's right.

Q. And he told you the prices are on there?

A. Yes, and they are for sale.

Q. And they are for sale?

A. That's right.

Justice Doyle: But you had to open any one of these to see what was in the inside, didn't you?

The Witness: Yes, your Honor.

Justice Doyle: It was not open and displayed so that you could see the contents without taking it from the shelf and opening it?

The Witness: No, your Honor.

Q. Mr. Kahan, after you gave your direct testimony, the District Attorney then asked you some more questions about [fol. 23] prices and you gave us a price of ten cents on Spotlight, a price of 18 cents on People's Exhibit 2, Model Poses; and a price of \$1.65 on People's Exhibit 3, Shadowless Figure Portraits?

A. That's right.

Q. Those are not the prices that appear upon the volumes are they?



A. No, sir.

Q. And those prices the defendant told you were the wholesale prices which he sells them for?

A. I don't know.

Q. Well, didn't the defendant tell you that he does primarily a wholesale business?

A. He did not.

Q. Didn't discuss that with him at all?

A. No, sir.

Q. Now, you say you asked the defendant if his name wasn't Wishengrad?

A. That's right.

Q. You had never seen this defendant before, had you?

A. No, sir.

Q. And you had never known him by the name of Wishengrad, had you?

A. I did not.

Q. Now, isn't it a matter of fact, Mr. Kahan, that the conversation had with the defendant about whether his name was Wishengrad or Winters, or whatever it might be, was between Mr. Sumner and this defendant?

A. No, sir.

Q. And didn't this defendant tell Mr. Sumner that his name had been Wishengrad, and that it had been legally changed by the Court order to Winters?

A. I was not present at the said conversation, when the said conversation took place.

Mr. Rosenthal: Now, I ask that this book be marked Defendant's Exhibit A for identification.

Justice Cooper: Mark it Defendant's Exhibit A for identification.

[fol. 24] (The book referred to was marked Defendant's Exhibit A for identification, of this date.)

Q. Now, Mr. Kahan, I direct your attention to page 143 of the Defendant's Exhibit A for identification and ask you if in your opinion, that is lewd, licentious, obscene, lascivious or in anywise objectionable?

Mr. Fitzpatrick: I object to that question, your Honor. That calls for the opinion of the witness. I think that the matter should be passed upon by the Court, not the witness.

Justice Cooper: Well, Mr. District Attorney, speaking for myself, I wonder whether or not it is nevertheless admissible, for us to accept, agree with, or reject, as we see fit.

In other words, I think that we can at least listen to what the reaction of this witness may be to a given picture. We are not bound by it.

Mr. Fitzpatrick: I will withdraw the objection.

Justice Cooper: I don't know how my colleagues feel.

Justice Doyle: I think the very nature of his job itself is supposed to make him an expert on those matters.

Justice Cooper: We will take it. We will take it.

Mr. Fitzpatrick: If your Honors please, another point occurs to me. The picture is not in evidence.

Justice Cooper: That's right. That is another ground [fol. 25] for an objection, if he isn't offering it to us. He is merely asking this man to pass upon a picture. It will be worthless, of course, but if he wants to do it that way, it is up to him. Of course, the triers of the facts have seen nothing of that particular exhibit. I guess he knows it. He has been trial counsel for quite a while. He knows what he is doing.

The Witness: What is your question?

Justice Cooper: He asked you whether you regard that picture as objectionable in the same respect that you found the exhibits already introduced on behalf of the People objectionable.

The Witness: I do.

Justice Cooper: He said he does.

All right.

By Mr. Rosenthal:

Q. Now, I show you page 163 of the Defendant's Exhibit A for identification and ask you if you find that picture objectionable.

A. No, sir.

Justice Cooper: Has that been marked?

Mr. Rosenthal: It is the same book.

Justice Cooper: All right. You gave the page number. Go ahead.

Q. Now, I show you page 241 of the Defendant's Exhibit A for identification and ask you if you find that objectionable.

A. No, sir.

Q. Now, Mr. Kahan, you attended the World's Fair, didn't you?

A. Yes.

Q. And you have heard of an artist by the name of Watteau, haven't you?

A. Yes.

Q. Now, I show you page 173 of the Defendant's Exhibit A for identification and ask you if the picture appearing on the bottom or to your left is, in your opinion, objectionable.

A. No, sir.

[fol. 26] Q. And what about the picture appearing on the right?

A. No, sir.

Q. In your opinion they are not objectionable?

A. No, sir.

Q. So that the only picture that I have shown you in this Defendant's Exhibit A that, in your opinion, is objectionable is the one appearing on page 143?

A. That's right.

Q. Is that correct?

Mr. Rosenthal: Now, at this time, if the Court please, I offer Defendant's Exhibit A for identification into evidence. It is a collection of the masterpieces of the New York World's Fair, Official Illustrated Catalog.

Mr. Fitzpatrick: I have no objection to the book being offered in evidence, if the particular pages are marked so that your Honors can see which the—

Mr. Rosenthal: Yes.

Justice Cooper: Really, the only one—you have already called the pages to our attention.

Mr. Rosenthal: 143, 163, 241 and 173.

Justice Cooper: All right. Now, with that understanding, it will be received, limited to those pages.

Mr. Rosenthal: That is correct.

Justice Cooper: Is that all right, Mr. District Attorney?

Mr. Fitzpatrick: Yes, your Honor.

(The pages referred to of Defendant's Exhibit A for identification, were admitted in evidence and marked Defendant's Exhibit A, of this date.)

[fol. 27] Justice Cooper: Now, go to something else. We have got that.

Mr. Rosenthal: The one on page 163 is the one I believe he said was objectionable, was it not?

The Witness: 143 was.

Q. Now, Mr. Kahan, you have heard of Bridgeman Publishers, Inc., haven't you?

A. No, sir.

Q. Of Pelham, New York?

A. No, sir.

Q. Did you ever hear of the Bridgeman Art Books?

A. No, sir.

Q. Did you ever hear of the Book of One Hundred Figure Drawings?

A. No, sir.

Q. Did you ever hear of The Female Form, by Ben Pinchot?

Mr. Fitzpatrick: I object to these questions.

Justice Cooper: Yes. I think we have heard enough along that line. There was a certain latitude we really allowed. Strictly speaking, it should be confined to the publications taken at that time; and I think you have gone far enough along those lines.

Mr. Rosenthal: All right.

Q. Now, Mr. Kahan, you have heard of the Franklin Square Agency, a division of Harper Brothers, haven't you, a periodical agency?

A. I did.

Q. And you know they publish a catalog, seasonal catalog, setting forth the various periodicals for sale?

Mr. Fitzpatrick: I object, your Honor.

A. Yes.

[[fol. 28] Mr. Fitzpatrick: There is no relevancy between the issues here and the catalog.

Justice Cooper: I don't know yet.

Mr. Rosenthal: I merely want to show that Headquarters Detective is sold generally and is advertised for sale.

Justice Cooper: Sustained.

Mr. Rosenthal: Exception.

Justice Cooper: Mark it for identification.

Mr. Rosenthal: Yes. May I have page 52 marked for identification.

(The page referred to was marked Defendant's Exhibit B for identification, of this date.)

Q. Now, Mr. Kahan, in respect to People's Exhibits 4 and 5, they were tied in bundles of about one hundred or two hundred in a bundle, weren't they?

A. Yes.

Q. And they were lying in the basement of the premises occupied by the defendant?

A. That's right.

Q. And there were various other periodicals and books and magazines tied up and lying there also, weren't there?

A. That's right.

Q. Probably hundreds of thousands?

A. Well, I don't know how many.

Q. Well, thousands at least?

A. That's right.

Q. And the same is true there—there is a sub-basement there, is there not?

A. That's right.

Q. And you found the same condition there?

A. That's right.

Q. Surplus stock or unsalable stock or things in storage?

A. That's right.

[fol. 29] Q. And when you asked the defendant about it and you told him that you were going to seize it, he said, "Why seize it? I'll destroy it."

A. That's right.

Q. Is that correct? Now, you have nothing in your complaint, have you, Mr. Kahan, about the defendant stating that, what the price was of People's Exhibits 4 and 5?

Mr. Fitzpatrick: I object to that question, your Honor. It isn't necessary for the witness to put evidence in his complaint."

Justice Cooper: Well, strictly speaking, Mr. District Attorney, you are right, I, in my humble opinion, believe; but we will allow it on the matter of veracity only.

Have you anything like that in the complaint?

The Witness: If your Honor will allow me.

Justice Cooper: Certainly. You have a right to examine the complaint.

Do you tell us there is not?

Mr. Rosenthal: There is not; and Mr. Kahan went through the same procedure in the Magistrates' Court, if your Honor allows it.

Justice Cooper: I don't see much—



Mr. Rosenthal: No, except that the prices of the others are listed.

The Witness: That's right, your Honor.

Justice Cooper: That particular one is not listed; which could be very well called to our attention by way of argument, rather than by question and answer.

Mr. Rosenthal: That is all.

[fol. 30] Mr. Fitzpatrick: I have no further witnesses, your Honor. The People's case.

Justice Cooper: Motions, please.

#### MOTION TO DISMISS

Mr. Rosenthal: Now, at this time, if the Court pleases, the defendant moves to dismiss the first count of the information—

Justice Cooper: Papers, Mr. District Attorney.

Mr. Rosenthal: —which concerns the Spotlight magazine—

Justice Cooper: Just wait a second.

May we have No. 3, please?

Mr. Rosenthal: I have another copy.

Justice Cooper: We have it. It is all right.

All right, counsel. I understand that you wish to address yourself to each count separately—

Mr. Rosenthal: I think it would be best.

Justice Cooper: —and make the same motion as to each count.

Mr. Rosenthal: That is correct.

Justice Cooper: The Court has already conferred, anticipating that that would be your motion, and we have examined these magazines in question, and examined the law in connection therewith, and we are now ready to render our opinion, rather our decision, on each count, so as to obviate the necessity of your repeating it as to each one.

Mr. Rosenthal: Thank you, your Honor.

Justice Cooper: We will consider that it has been separately made as to each count, that there is no *prima-facie* case made out by the People.

[fol. 31] As to Count No. 1, dealing with the magazine Spotlight, by a majority of the Court your motion is granted, and Mr. Justice Flood dissents.

As to Count No. 2, dealing with the magazine The Model Poses, your motion is granted; Mr. Justice Flood dissents.

As to the third count, dealing with Shadowless Figure Portraiture, by a majority of the Court your motion is granted, Mr. Justice Flood dissents.

Before going on to the fourth count, I should like to say, speaking for myself, that the opinions by the Court of Appeals of magazines that I have examined, and as I recall, are even more offensive, if that term can be used, than what is illustrated in People's Exhibits 1, 2 and 3, regardless of my personal opinion, and I may very well feel that those are objectionable, but my interpretation of the Court of Appeals' ruling prompted me to decide these first three counts in the manner that I have discussed.

Now, as to the fourth count, dealing with the magazine—

Mr. Rosenthal: Headquarters Detective.

Justice Cooper: —Headquarters Detective, that is denied by the entire bench; and as to the fifth count, dealing also with Headquarters Detective magazine, that is likewise unanimously denied.

Mr. Rosenthal: Might I ask at this time, your Honor—I haven't the information in front of me; I examined it before, though—on the Exhibits 4 and 5, are the People proceeding [fol. 32] under subdivision 1 or subdivision 2 of Section 1141?

Justice Cooper: They are evidently proceeding under No. 2, because that is the language that appears in the statute, subdivision 2. Am I right, Mr. District Attorney?

Mr. Fitzpatrick: It appears from the memorandum I have in front of me that subdivision 2 is the subdivision. ☉

Mr. Rosenthal: Would your Honor hear *be* at greater length on the question of subdivision 2?

Justice Cooper: All right.

Mr. Rosenthal: I made a research into the cases decided under this section and could find no cases or no cited cases under subdivision 2. In my humble opinion, that subdivision is clearly unconstitutional, and I say it for this reason: that if you follow the letter of the law, a case-book used in law school in criminal law, which is a book composed primarily of crime or stories of crime or articles concerning crime, would be banned by this subdivision.

Justice Doyle: You claim that our New York criminal law library then would—

Mr. Rosenthal: If you follow the letter of the law, I say to you that every detective thriller, every detective story that has been written, these crime and mystery stories that

are published and sold throughout the land, can be banned by this section, if you follow that section; and that the various Western stories, biff-bang boys, Dead-eye Dick shoots four Indians, all the Nick Carter stories which I [fol. 33] read as a boy, and I imagine some of the members on this bench read; even Horatio Alger with some of his blood and thunder.

Justice Cooper: As far as I am concerned, you are treading on safer ground when you speak of Horatio Alger. I'll tell you how much I think of Horatio Alger. I really feel that while it is not literature, it has done a great deal to inculcate in boys as they grew up some of the very fine copy-books maxims. But I certainly think that is a far cry from the lurid, crazy material that makes up People's Exhibits 4 and 5.

Justice Doyle: We know so many Horatios on our bench, too, you know.

Mr. Rosenthal: That I know.

Might I say this with respect to People's Exhibits 4 and 5: I happen to know—not with respect to this particular magazine, but in general—how these magazines are created. They are written primarily and practically entirely by either newspaper men or retired newspaper men. The facts are obtained from files of the various police courts or the various newspaper clips, and it is a rehashing and a re-writing of things that have been in public print.

Now, I can't see where a limitation of the sort that is attempted to be set forth in subdivision 2 is constitutional, because if you follow it to its logical conclusion, every book, every magazine that deals with bloodshed or lust or things of that sort, and deals with nothing else—I mean, the average detective story, it deals with a crime, sometimes there [fol. 34] is killing in it, sometimes there are three or four or five killings in it; The Bat, the play The Bat—

Justice Cooper: It is not the killings *per se*, Mr. Rosenthal; it is the manner in which — is treated and handled and set up in the magazine—the typography, and the language used to depict these crimes—that we feel brings it within the prohibition of subdivision 2 of the section involved; and that, of course, is our judgment; we may be in error.

Mr. Rosenthal: I understand.

Justice Cooper: But we know the arguments that are always advanced, and we have examined those exhibits particularly to decide whether from our point of view they

do offend within the meaning of that subdivision, and we have decided that they do as a *prima-facie* case.

Mr. Rosenthal: I understand.

May I have an exception to your Honors' ruling on the motion.

Justice Cooper: Certainly. Certainly.

[fol. 35] MURRAY WINTERS, called as a witness in his own behalf, being duly sworn, testifies as follows:

Direct examination.

By Mr. Rosenthal:

Q. What is your name?

A. Murray Winters.

Q. Where do you live?

A. 4410 Broadway, Manhattan.

Q. Mr. Winters, your name was formerly Murray Wishengrad?

A. That's right.

Q. And you had it legally changed to Murray Winters?

A. Yes, sir.

Q. Do you know the exact date of that?

A. I believe it was in 1937.

Q. By Court order?

A. That's right.

Q. Now—

Justice Cooper: Excuse me, Mr. Rosenthal. I have no idea to curtail you, but just get down to 4 and 5.

Q. Now, Mr. Winters, People's Exhibits 4 and 5, the Headquarters Detective magazines, Mr. Kahan has testified were tied in bundles of 150 or 200 and were in the basement of the premises, is that correct?

A. Yes, sir.

Q. Now, did you ever—how long had you had those magazines lying there?

A. At least two years; approximately two years.

Justice Cooper: Go ahead.

Q. Did you tell Mr. Kahan that they were for sale?

A. No, sir.

Q. Did you ever tell him that they were ten cents or fifteen cents a copy?

A. I don't recall that.

Q. Well, did you or didn't you?

A. I believe I didn't.

[fol. 36] Justice Cooper: You believe you did not?

The Witness: I did not.

Q. And where had you purchased these magazines?

A. A part of a lot of magazines that came in, a part of another lot.

Justice Cooper: He just asked you where did you purchase these, referring to People's Exhibits 4 and 5.

The Witness: They were purchased from a dealer, who offered these along with others.

Justice Cooper: Will you give us the name, please. Where, he asked. From whom? Is that what you asked?

Mr. Rosenthal: Yes.

The Witness: Well, the——

Q. Do you remember the name of the dealer?

A. His name was Ginsberg.

Q. And that was approximately two years ago, you say?

A. That's right.

Q. And they had been in your cellar ever since?

A. That's right.

Q. You didn't offer to sell these to Mr. Kahan or to anyone else, did you?

A. I did not.

Justice Cooper: What did you have them in your cellar for?

The Witness: Well, we took them along with these and others; we had to take the lot.

Justice Cooper: You bought them?

The Witness: It was just a job.

Justice Cooper: A job lot?

[fol. 37] The Witness: So many. Here they are and you take them all.

Justice Cooper: Well, do you say that you have never sold any magazines similar to People's Exhibits 4 and 5; I mean copies of any of those particular——

The Witness: As far as we were concerned, they were unsalable.



Justice Cooper: Well, did you have them there to sell?

The Witness: They were on the premises, but we couldn't sell them.

Justice Cooper: All right.

By Mr. Rosenthal:

Q. And who discovered these magazines, Mr. Kahan or Mr. Sumner?

A. Mr. Sumner.

Q. And was there any conversation between you and Mr. Sumner or between Sumner and Mr. Kahan in your presence?

A. Well, Mr. Sumner, as I recall, picked one up and said, "What are you doing with these?" I said, "Well, what is wrong with those?" He said, "They are on Mr. LaGuardia's list of——"

Q. Banned magazines?

A. "—banned publications." I said, "Well, if that is the case, I will destroy them."

Justice Cooper: I am awfully glad that that came out after we denied the motion, otherwise——

Mr. Rosenthal: It wouldn't have influenced the Court in any way, I know.

Justice Cooper: There is talk about being guided by the edicts of the Mayor.

All right. Go ahead.

[fol. 38] Mr. Rosenthal: I know your Honors to be fair and fearless, regardless of edicts.

Q. And you said if that is the case, you would destroy them?

A. I said, "I did not know that. If that is the case, I will destroy them." And Mr. Sumner didn't seem to say anything about that, and Mr. Kahan says, "No, we will take them."

Q. And they took them?

A. And they took them.

Mr. Rosenthal: That is all.

Q. Well, just to give the Court an idea, how large is your store?

A. Approximately 135 feet deep by about 25 feet wide.

Q. Now, you have the store and you have a sub-basement, a basement, rather?

A. And a sub-basement.

Q. And they are all the same size as the store?

A. Approximately.

Q. And they are all filled with books, magazines, periodicals?

A. Yes, sir.

Justice Doyle: Were you ever convicted of any crime?

The Witness: Yes, sir.

Justice Doyle: What?

The Witness: In or approximately ten or eleven years ago, the charge was selling obscene printed matter.

Justice Cooper: And you were convicted or did you plead guilty to it.

The Witness: Yes, sir.

Justice Cooper: All right. Anything else?

Mr. Rosenthal: That is all, sir.

[fol. 39] Cross-examination.

By Mr. Fitzpatrick:

Q. Have you ever been convicted of any other crime?

A. No, sir.

Q. How long were you engaged in business at the premises where you were arrested? How long were you engaged in business at the premises where you were arrested?

A. Let's see; about five years.

Q. How old are you?

A. Thirty-two.

Q. Are you married?

A. Yes, sir.

Q. What is your classification number in the draft?

A. 3-A, sir.

Q. Isn't it a fact that People's Exhibits 4 and 5 were available for sale?

A. They were not offered for sale, sir; they were on the premises.

Justice Cooper: He said "were available for sale."

The Witness: They were on the premises, but they were not—

Q. Would you have sold them if someone had ordered a copy of either People's Exhibit 4 or 5?

Mr. Rosenthal: That is objected to, if the Court pleases.  
The Court: Sustained.

Mr. Fitzpatrick: No further questions, your Honor.

Mr. Rosenthal: I just want to ask two questions in view of what the District Attorney developed.

Redirect examination.

By Mr. Rosenthal:

Q: This business is operated by whom, Mr. Winters?

A. It is a partnership; my brother and myself are the sole owners.

Q. And is your brother actively engaged in the business [fol. 40] at present?

A. He happens to be in the armed services at present.

Q. How long has he been in the armed services?

A. Since July of this year, or 1942.

Q. And your business is also the publication of a well-known joke book known as Wehman Brothers Joke Book?

A. And other publications.

Q. You actually publish those, don't you?

A. That's right.

Recross-examination.

By Mr. Fitzpatrick:

Q. Have you any employees at that shop?

A. Well, we did have until the other day. We have a shipping clerk.

Q. You are in full charge and control of this store?

A. Yes, sir.

Q. You were in full charge of the store on the day of your arrest?

A. Yes, sir.

Mr. Fitzpatrick: That is all.

Mr. Rosenthal: That is the defendant's case. The defendant rests.

#### RENEWAL OF MOTION TO DISMISS

At this time, if the Court pleases, I renew the motion made at the close of the People's case, and upon the further ground that we now have affirmatively from the defendant that there was no sale, no offer to sell. The exhibits in ques-

tion were in the cellar, tied in bundles; they weren't even on the store premises.

Justice Cooper: As to Counts 4 and 5—and that is what your motion is addressed to at this time?

Mr. Rosenthal: Yes, your Honor.

Justice Cooper: —motion is denied—

[fol. 41] Mr. Rosenthal: Exception.

Justice Cooper: —and the defendant is found guilty of Counts 4 and 5. Officer and record for sentence January 27.

Mr. Rosenthal: Bail continued, your Honor?

Justice Cooper: Bail continued.

Mr. Rosenthal: Your Honor, I loaned the People my exhibit, Exhibit 3. He has been acquitted on the count involving that exhibit.

Justice Cooper: So what do you want?

Mr. Rosenthal: May it be returned to me?

Justice Cooper: Certainly. I don't think the District Attorney wants it. Do you, Mr. District Attorney? He has been acquitted by a majority vote anyhow.

Mr. Rosenthal: And Defendant's Exhibit A, which also applied only to counts 1, 2 and 3.

Justice Cooper: Have you got everything you want, now?

Mr. Rosenthal: Yes, your Honor, everything but a complete acquittal.

Justice Cooper: You did a pretty good job. You came very close on 1, 2 and 3.

(Case closed.)

[fol. 42] IN COURT OF SPECIAL SESSIONS OF THE CITY OF  
NEW YORK, NEW YORK COUNTY

Part VI

Charge: Obscene Prints, Penal Law, Section 1141

THE PEOPLE OF THE STATE OF NEW YORK,

against

MURRAY WINTERS, Defendant

SENTENCE

Sentenced at 100 Centre Street,  
New York, New York,  
January 27, 1943.

Before Hon. George B. DeLuca, Presiding Justice; Hon.  
John V. Flood, Hon. Irving Ben Cooper, Associate  
Justices

APPEARANCES:

For the People: Thomas J. McNamee, Esq., Deputy Assistant District Attorney, 155 Leonard Street, New York, N. Y.

For Defendant: Gilbert S. Rosenthal, Esq., 366 Broadway, New York, N. Y.

Court Clerk: No. 6, Murray Winters!

Justice DeLuca: Yes, counsellor.

Mr. Rosenthal: First, for the purposes of the record, may I make a motion in arrest of judgment as to the convictions on Counts 4 and 5 upon the ground that the information [fol. 43] does not state a crime; and upon the further ground that subdivision 2 of section 1141 is unconstitutional.

The Court: Denied.

Mr. Rosenthal: Exception.

Now, in respect to the case itself, two of the members of this bench were part of the trial bench.

Justice DeLuca: That's right.

Mr. Rosenthal: The counts upon which the defendant was convicted concerned two back issues of a magazine known as Headquarters Detective, of which he had, I



believe, two thousand issues tied up in bundles in the basement. The testimony of the defendant was that he had purchased these as a job lot along with several thousand other magazines; and that he had sold the others, hadn't sold these, and had practically abandoned them.

The defendant has a place of business at 712 Broadway, and the primary business of his firm consists of the publication of joke books and, for instance, this Webman Brothers Easy Method for Learning Spanish, How to Play Chess, and various pulp publications. He is the publisher of them. He is in business with his brother. It is a partnership. The brother is now in the United States Army. He has a prior conviction in 1932, I believe, which he admitted.

Justice DeLuca: Nineteen thirty-two, yes.

Mr. Rosenthal: Which he admitted to on the stand, and which occurred at a time when he was working for someone else before he was in business for himself.

I disagreed with the Court at the time on the question of law, and I believe that was what was solely involved here, was a question of law as to whether or not these magazines [fol. 44] came within section 1141; and whether or not section 1141, subdivision 2, was constitutional.

These magazines, as a matter of fact, are still sold today on the new-stands of the City of New York, Headquarters Detective—I mean the same—I don't know the contents, but the same magazine, published by the same firm; and, in fact, up until, I believe, two months ago had mailing privileges. Two months ago the United States postal authorities revised their mailing-privilege principles and took it away from this magazine; at least, so I have been informed.

I might say this, that his business is not one of a retail business; I mean, although he has a store, I don't think his retail business averages three per cent of his actual business, I have gone over that with his accountants and I am satisfied to that effect, or I wouldn't make the statement to the Court.

Justice Flood: Have we any copies of those magazines handy?

Court Clerk: I can get them for you, Judge. They are upstairs in the Clerk's office.

Justice DeLuca: We have to call it again. I wasn't on the trial. I would like to look at them and see how vicious they are, or indecent.

Mr. Rosenthal: Well, they were typical detective-story magazines; I mean, in my opinion.

Justice DeLuca: That doesn't tell me anything regarding indecency.

Mr. Rosenthal: They are a re-hashing of cases where people have been arrested.

Justice DeLuca: Well, you don't mind waiting a little while?

Mr. Rosenthal: No, your Honor.

Justice DeLuca: We will call it again.

• • • • •

Court Clerk: No. 6, Murray Winters!

[fol. 45] Mr. Rosenthal: My argument, your Honor, is that under that section the case books we used in law school to study criminal law would be barred; or Sherlock Holmes, or Van Dine detective stories, Wild West magazines. The Court disagreed with me, however.

Justice Flood: I should say the legislature disagreed.

Mr. Rosenthal: I mean the Court disagreed with me on the question of whether it was constitutional.

I want to correct an impression I may have left when I said the defendant's business was primarily wholesale. I meant in the publishing and selling of these magazines that are published by Wehman Brothers, the firm that he owns, such as How to Play Chess, An Easy Method for Learning Spanish, Book on Pidgeons.

Justice Flood: I assumed that is what you meant, because you said that this was one of the job lots that was there in storage.

Mr. Rosenthal: Yes, sir.

Justice DeLuca: Well, we think that the magazine comes within the subdivision—

Mr. Rosenthal: I understand.

Justice DeLuca: —within the prohibition of the subdivision. Whether or not it is constitutional is another matter.

All right. The judgment of the Court is the defendant pay a fine of One hundred (100) Dollars or stand committed for Thirty (30) Days.

Mr. Rosenthal: Thank you.

• • • • •

I hereby certify that the foregoing is a true and correct transcript of the within proceedings as reported by me.

Michael J. Mickell, C. S. R., Official Stenographer.

[fol. 46] IN SUPREME COURT OF NEW YORK, APPELLATE  
DIVISION, FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK, Respondent,  
against

MURRAY WINTERS, Defendant-Appellant

STIPULATION AS TO EXHIBITS

Subject to the Approval of This Court:

It is hereby stipulated and agreed by and between the undersigned that People's Exhibits 1, 2, and 3 and Defendant-Appellant's Exhibit A which relate to the first three counts of the Information as to which the defendant was acquitted need not be printed, and that People's Exhibits 4 and 5, and Defendant-Appellant's exhibit B for identification which consists of voluminous printed matter, being magazines and a catalogue need not be printed, but that People's Exhibits 4 and 5, and Defendant-Appellant's Exhibit B for identification be submitted to the Court on the argument or submission of this appeal.

Dated, New York City, July 19th, 1943.

Frank S. Hogan, District Attorney, N. Y. County,  
for Richard G. Deuzer, Deputy Assistant, District  
Attorney for Respondent. Arthur Seiff, Attorney  
for Defendant-Appellant.

So ordered J. M. C.

[fol. 47] AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,  
County of New York, ss:

ARTHUR N. SEIFF, being duly sworn, deposes and says:  
I am the attorney for the defendant-appellant herein and  
am familiar with all the facts and proceedings had. No  
opinion was rendered by any of the trial justices herein on.

the rendition of the judgment of conviction, except as hereinbefore set forth.

Arthur N. Seiff.

Sworn to before me this 3d day of September, 1943,  
Milton S. Ward, Attorney and Counsellor-at-Law,  
P. O. Ad. 570—7th Ave., N. Y. C. Residing in Bronx  
County; Bx. Co. Clk's No. 6; N. Y. Co. Clk's No. 35;  
Commission expires March 30, 1945.

[fol. 48] Clerk's Certificate to foregoing transcript  
omitted in printing.

[fol. 49] IN COURT OF SPECIAL SESSIONS OF THE CITY OF  
NEW YORK, COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Complainant,  
against

MURRAY WINTERS, Defendant

#### NOTICE OF APPEAL TO COURT OF APPEALS

SIRS:

Please take notice that pursuant to leave granted by an order and certificate dated June 8th, 1944 issued pursuant to Section 520 of the Code of Criminal Procedure, the above named defendant hereby appeals to the Court of Appeals from an order and judgment of the Appellate Division of the Supreme Court, First Department, dated May 19th, 1944, affirming a judgment of the Court of Special Sessions of the City of New York, County of New York, rendered January 27th, 1943 convicting the above named defendant of the crime of possessing with intent to sell magazines in violation of Subdivision 2 of Section 1141 of the Penal Law, and fining him the sum of \$100 or sentencing him to thirty days in default of payment of such fine, and from [fol. 50] each and every part of said order and judgment of affirmation, as well as from the whole thereof.

Dated, New York, June 8th, 1944.

Yours, &c., Arthur N. Seiff, Attorney for Defendant,  
Office & P. O. Address, No. 570 7th Avenue, Borough  
of Manhattan, New York City.

To Clerk of Court of Special Sessions, New York City.  
To Hon. Frank A. Hogan, District Attorney, New York  
County.

[fol. 51] IN SUPREME COURT OF NEW YORK, APPELLATE  
DIVISION, FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK, Respondent,  
against

MURRAY WINTERS, Defendant-Appellant

ORDER GRANTING LEAVE TO APPEAL

An application in the above entitled proceeding having been made to me, one of the Justices of the Appellate Division of the Supreme Court, First Department, under Section 520, subdivision 3, of the Code of Criminal Procedure for leave to appeal to the Court of Appeals from the order of affirmance entered in the office of the Clerk of this Court on May 19th, 1944,

Now, on reading the annexed affidavit of Arthur N. Seiff, attorney for the defendant-appellant; and it appearing to me that a question of law is involved which ought to be reviewed by the Court of Appeals, permission is hereby granted to the said defendant-appellant to appeal to the Court of Appeals.

Albert Cohn, Justice of the Appellate Division of the Supreme Court, First Department.

June 8th, 1944.

[fol. 52] IN SUPREME COURT OF NEW YORK, APPELLATE  
DIVISION, FIRST DEPARTMENT

Present: Hon. Francis Martin, Presiding Justice; Hon. Alfred H. Townley, Hon. Edward J. Glennon, Hon. Edward S. Dore, Hon. Albert Cohn, Justices.

14150

PEOPLE OF THE STATE OF NEW YORK, Respondent

VS.

MURRAY WINTERS, Appellant

ORDER OF AFFIRMANCE ON APPEAL FROM JUDGMENT— May 19,  
1944

An appeal having been taken to this Court by the defendant from a judgment of the Court of Special Sessions of the City of New York, County of New York, rendered on the



27th day of January, 1943, and said appeal having been argued by Mr. Arthur N. Seiff of counsel for the appellant, and by Mr. Alan J. Elliot of counsel for the respondent, and a brief having been filed by Mr. Emanuel Redfield of counsel for New York City Committee of the American Civil Liberties Union, as *amicus curiae*; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

Enter.

F. M.

[fol. 53] IN SUPREME COURT OF NEW YORK, APPELLATE  
DIVISION, FIRST DEPARTMENT, MARCH, 1944

Francis Martin, P. J.; Alfred H. Townley, Edward J. Glennon, Edward S. Dore, Albert Cohn, JJ.

14150

PEOPLE OF THE STATE OF NEW YORK, Respondent

vs.

MURRAY WINTERS, Appellant

Appeal from a judgment of the Court of Special Sessions of the City of New York, County of New York, convicting defendant of the crime of possessing with intent to sell magazines in violation of Subdivision 2 of Section 1141 of the Penal Law. Arthur N. Seiff for appellant.

Alan J. Elliot of counsel (Stanley H. Fuld with him on the brief; Frank S. Hogan, District Attorney) for respondent.

Emanuel Redfield of counsel (Osmond K. Fraenkel, attorney) for New York City Committee, American Civil Liberties Union as *Amicus Curiae*.

#### OPINION

[fol. 54] COHN, J.:

Defendant, a book dealer, found in possession of a large number of magazines which purported to contain true cases of crimes from police records and files, was convicted in the

Court of Special Sessions of the City of New York of a violation of Subdivision 2 of Section 1141 of the Penal Law.

The statute reads as follows:

"A Person \* \* \* who \* \* \*

2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; \* \* \*

\* \* \* \* \*

Is guilty of a misdemeanor \* \* \*."

Upon the evidence submitted at the trial, there was a sufficient showing that defendant had in his possession the magazines with intent to sell. As the information charges; the magazines are, without doubt, "devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime". They contain a collection of crime stories which portray in vivid fashion [fol. 55] tales of vice, murder and intrigue. The stories are embellished with pictures of fiendish and gruesome crimes, and are besprinkled with lurid photographs of victims and perpetrators. Featured articles bear such titles as "Bargains in Bodies", "Girl Slave to a Love Cult", and "Girls' Reformatory"; these suggest the pattern of the literature.

That such publications tend to demoralize the minds of their more impressionable readers cannot be doubted. The statute which is aimed at restraining the publication and sale of such printed matter, we think, is a legitimate exercise of the police power of the state in that it is designed to promote the general welfare and to protect the morals of the community (*People v. Gitlow*, 234 N. Y. 132, 137, affirmed *Gitlow v. New York*, 268 U. S. 652). A similar statute was upheld by the Supreme Court of Errors of the State of Connecticut upon the ground that publications devoted wholly or mainly to lawless deeds of

bloodshed, lustful or lascivious conduct are "calculated to induce, especially among the young, the immoralities they are thus incited to dwell upon, and so to endanger the public morals" (*State v. McKee*, 73 Conn. 18, 26, 46 Atl. 409, 412).

Upon the same principle, it has been held in other jurisdictions, that a state may forbid the publication of details of an execution of death for crime (*State v. Pioneer Press Co.*, 100 Minn. 173, 110 N. W. 867) or the publication of scandal, and stories of immoral conduct (*Williams v. State*, 130 Miss. 827, 94 So. 882; *In re Banks*, 56 Kan. 242, 42 Pac. 693, 694; *State v. Van Wye*, 136 Mo. 227, 37 S. W. 938; [fol. 56] *Commonwealth v. Herald Pub. Co.*, 128 Ky. 424, 108 S. W. 892).

The statute here involved condemns the sale and printing of books, pamphlets, magazines and newspaper-, which are "devoted to the publication and principally made up of" pictures and stories of deeds of bloodshed, lust or crime. Publications dealing with crime news as an incident to the legitimate purposes of science or literature are not prohibited. Moreover, as the prosecution readily concedes, the statute does not seek to suppress "a large class of recognized literature including practically all detectives and western stories and books". It is aimed exclusively at printed matter which presents tales of bloodshed, crime or lust in a manner that would have a tendency to demoralize its readers and would be likely to corrupt the morals of the young and lead them to immoral acts.

Defendant urges that the law under which he was convicted is unconstitutional in that it violates the State Bill of Rights (Art. 1, Section 8) and the Fourteenth Amendment of the Federal Constitution.

The State Constitution (Art. 1, Section 8) provides in part:

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

The freedom of speech and of the press, which is secured by such a constitutional guaranty, does not imply complete [fol. 57] exemption from responsibility for everything a citizen may say or publish. Indeed, the state Bill of Rights

expressly provides that a person exercising the freedom is responsible for the abuse of that right.

Pursuant to the police power and without abridging freedom of the press, the state may enact reasonable regulations in order to protect the general welfare, public safety and order and public morals. In *People v. Gittlow*, *supra*, the Court of Appeals (at p. 137) said:

"While the right to publish is thus sanctioned and secured, the abuse of that right is excepted from the protection of the Constitution, and authority to provide for and punish such abuse is left to the Legislature. The punishment of those who publish articles which tend to corrupt morals, induce crime or destroy organized society, is essential to the security of freedom and stability of the state. While all the agencies of government, executive, legislative and judicial, cannot abridge the freedom of the press, the Legislature may control and the courts may punish the licentiousness of the press."

In *People v. Most*, 171 N. Y. 423, the court said (p. 431):

"The Constitution does not protect a publisher from the consequences of a crime committed by the act of publication. It does not shield a printed attack on private character, for the same section from which the above quotation is taken expressly sanctions criminal prosecution for libel. It does not permit the advertisement of lotteries, for the next section prohibits lotteries and the sale of lottery tickets. It does not permit the publication of blasphemous or obscene articles as the authorities uniformly hold. (*People v. Ruggles*, 8 Johns. 290, 297; *People v. Muller*, 96 N. Y. 408; *In re Rapier*, 143 U. S. 110.) It places no restraint upon the power of the legislature to punish the publication of matter which is injurious to society according to the standard of the common law. It does not deprive the state of the primary right of self-preservation.  
• • • "

By the due process clause of the Fourteenth Amendment of the Federal Constitution, it is provided:

"nor shall any State deprive any person of life, liberty, or property, without due process of law."

It is now well settled that freedom of the press, like freedom of speech, is a fundamental public right and that the due process clause of the Fourteenth Amendment may make it unlawful for a State to abridge by its statutes freedom of the press which the First Amendment safeguards against encroachment by Congress. (*Thornhill v. Alabama*, 310 U. S. 88, 95; *Lovell v. Griffin*, 303 U. S. 444, 450; *Grosjean v. American Press Co.*, 297 U. S. 233, 244; *Palko v. Connecticut*, 302 U. S. 319, 324.) However, it is equally well settled that this constitutional guaranty of freedom of speech and of the press does not deprive the State of [fol. 59] its police power to enact laws in the legitimate exercise of the police power. (*Gillow v. New York*, 268 U. S. 652, 666, 667; *Stromberg v. California*, 283 U. S. 357, 359, 368, 369.) In *Near v. Minnesota*, 283 U. S. 697, the Supreme Court reiterated the principle in the following language by Chief Justice Hughes (p. 707):

"It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property. \* \* \* In maintaining this guaranty, the authority of the state to enact laws to promote the health, safety, morals and general welfare of its people is necessarily admitted. The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise. \* \* \* Liberty of speech, and of the press, is also not an absolute right, and the state may punish its abuse."

Accordingly, we conclude that the statute challenged is valid; that its enactment is a legitimate exercise of the police power of the State, and that it is not violative of the State or the Federal Constitution:

The judgment of conviction should be affirmed.

All Concur.

[fol. 60] Clerk's certificate to foregoing transcript omitted in printing.



[fol. 61] IN THE COURT OF APPEALS OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, Respondent,

against

MURRAY WINTERS, Appellant-Defendant

REMITTITUR—July 19, 1945

Be it remembered that on the 25th day of July, in the year of our Lord 1944, Murray Winters, the appellant in this cause, came hereunto the Court of Appeals by Arthur N. Seiff his attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department.

And the People etc. the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Arthur N. Seiff, of counsel for the appellant, and by Alan J. Elliot, of counsel for the respondent, brief filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court, appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Court of Special Sessions of the City of New York, there to be proceeded upon according to law.

And afterwards, to wit on the 11th day of October, 1945, an order was duly made amending the remittitur herein, a certified copy of which order is hereto attached and made [fol. 62] a part hereof.

Therefore, it is considered that the said judgment be affirmed as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid such judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted unto the Court of Special Sessions of the City of New York, before the Justices thereof according to the form of the statute in such case made and

provided, to be enforced according to law, and which record now remains in the said Court of Special Sessions.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS,

Clerk's Office, Albany:

July 19, 1945.

I hereby certify, that the preceeding record contains a correct transcript of the proceedings in said cause in the Court of Appeals with the papers originally filed thereunder, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 63] IN COURT OF APPEALS OF NEW YORK

Present, Hon. John T. Loughran, Chief Judge, Presiding.

PEOPLE OF THE STATE OF NEW YORK, Respondent,

VS.

MURRAY WINTERS, Appellant.

ORDER AMENDING REMITTITUR—October 11, 1945

A motion to amend the remittitur in the above cause having heretofore been made herein upon the part of the appellant, papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted and the remittitur amended by adding thereto the following:

Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz: The defendant argued that his conviction violated the right of freedom of speech guaranteed by the Fourteenth Amendment of the Constitution of the United States. This Court held that the conviction aforesaid did not violate the right of freedom of speech guaranteed by the Fourteenth Amendment of the Constitution of the United States.

And, the Court of Special Sessions of the City of New York, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

John T. Loughran, Chief Judge. (Seal.)

[fol. 64] IN COURT OF APPEALS OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, et al,

v.

MURRAY WINTERS, Appellant

DECIDED—July 19, 1945

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the first judicial department, from a judgment of said court, entered May 19, 1944, which unanimously affirmed a judgment of the Court of Special Sessions of the City of New York, New York County (Cooper, P. J., Flood and Doyle, JJ.), convicting defendant of the crime of unlawfully possessing, with intent to sell, printed paper devoted to accounts of deeds of bloodshed, lust or crime, in violation of subdivision 2 of section 1141 of the Penal Law.

Arthur N. Seiff for appellant.

Emanuel Redfield and Osmond K. Fraenkel for New York City Committee of American Civil Liberties Union, *amicus curiae*, in support of appellant's position.

Sidney R. Fleisher for Authors' League of America, Inc. *amicus curiae*, in support of appellant's position.

Frank S. Hogan, District Attorney (Alan J. Elliot and Whitman Knapp of counsel), for respondent.

## OPINION

LOUGHRAN, J.:

After trial in the Court of Special Sessions of the City of New York, the defendant was convicted upon charges that he had possessed certain printed materials with intent to sell them, contrary to Penal Law, article 106, section 1141, subdivision 2. The Appellate Division affirmed and the justice who wrote its opinion gave the defendant leave to present the case to us.

The relevant words of section 1141 are these: "A person . . . who . . . 2. Prints, utters, publishes, sells, lends, gives away, distributes or shows or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed

paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal [fol. 65] deeds, or pictures or stories of deeds of bloodshed, lust, or crime . . . is guilty of a misdemeanor . . .

Numerous copies of magazines composed entirely of such pictures and stories were found on the occasion in question in the bookshop of the defendant.

Defense counsel takes the above text at its full literal meaning. "The statute (he says) makes no distinction between truth, fiction and statistics. All come within its condemnation equally, provided they consist of 'criminal news' or 'police reports' or 'accounts of criminal deeds.'" From his viewpoint the statute "condemns any publication devoted to and principally made up of criminal news or police reports or accounts of criminal deeds regardless of the manner of treatment." This conception—which would outlaw all commentaries on crime from detective tales to scientific treatises—may, we think, be dismissed at once on the short ground that its manifest injustice and absurdity were never intended by the Legislature. (See *Crooks v. Harrelson*, 282 U. S. 55.) On the other hand, we are to heed the rule which tells us to read a statutory text in accordance with the general subject matter of which it is a part. (See *Matter of Rouss*, 221 N. Y. 81, 91; *Matter of Kaplan v. Peyser*, 273 N. Y. 147.)

In this instance, the general subject matter constitutes Penal Law, article 106, the caption of which is "Indecency." The above text forms subdivision 2 of section 1141 of article 106. The caption of section 1141 is "Obscene prints and articles." Indecency and obscenity are not and never have been technical terms of the law and hence we are without any full or rigorous definition of the uses made thereof in the administration of justice. To be sure, our statutes dealing with indecent or obscene publications have generally been held to speak of that form of immorality which has relation to sexual impurity. (*People v. Muller*, 96 N. Y. 408; *Swearington v. United States*, 161 U. S. 446.) Such [fol. 66] indeed is the way this court has read subdivision 1 of section 1141 of the Penal Law. (*People v. Eastman*, 188 N. Y. 478.) But to limit the above words of subdivision 2 of section 1141 to that restricted meaning would be to reduce that subdivision to an unnecessary partial reduplication of subdivision 1. Since our respect for the Legislature is enough to keep us away from that interpretation, we move

along to the question of the validity of the broader scope of subdivision 2. From this point on, that subdivision will be called the statute.

Indecency or obscenity is an offense against the public order. (9 Halsbury's Laws of England (1st ed.), 530; 538; Harris & Wilshire's Criminal Law (17th ed.) 216; 1 Bishop's Criminal Law (9th ed.) 500, 504.) Collections of pictures or stories of criminal deeds of bloodshed or lust unquestionably can be so massed as to become vehicles for inciting violent and depraved crimes against the person and in that case such publications are indecent or obscene in an admissible sense, though not necessarily in the sense of being calculated or intended to excite sexual passion. This idea, as it seems to us, was the principal reason for the enactment of the statute. (Cf. *Magon v. United States*, 248 F. 201, certiorari denied, 249 U. S. 618; *Foy Productions Ltd. v. Graves*, 278 N. Y. 498.)

There is, as we are also persuaded, ample warrant in the evidence for the finding that the magazines which were taken from the defendant's premises were obnoxious to the statute. The 2,000 copies he kept there were tied up in small bundles that were suitable for delivery to distributors. There is proof of an admission by the defendant of his readiness to sell single copies indiscriminately. The contents are nothing but stories and pictures of criminal deeds of bloodshed and lust. The Appellate Division said: "The stories are embellished with pictures of fiendish and [fol. 67] gruesome crimes, and besprinkled with lurid photographs of victims and perpetrators. Featured articles bear such titles as 'Bargains in Bodies,' 'Girl Slave to a Love Cult' and 'Girls Reformatory.'" It is not suggested that any of the contributors was distinguished by his place in the literary world or by the quality of his style. (Cf. *Halsey v. New York Society*, 234, N. Y. 1.) In short, we have here before us accumulations of details of heinous wrongdoing which plainly carried an appeal to that portion of the public who (as many recent records remind us) are disposed to take to vice for its own sake. Whether the statute extends to accounts of criminal deeds not characterized by bloodshed or lust is a question that does not here arise. (See *United States v. Limehouse*, 285 U. S. 424; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576; *People v. Sanger*, 222 N. Y. 192).



We pass now to the defendant's contention that the statute is unconstitutional because the criterion of criminal liability thereunder is "a personal taste standard, uncertain, indefinite and *ex post facto* in its practical operation." In the nature of things there can be no more precise test of written indecency or obscenity than the continuing and changeable experience of the community as to what types of books are likely to bring about the corruption of public morals or other analogous injury to the public order. Consequently, a question as to whether a particular publication is indecent or obscene in that sense is a question of the times which must be determined as matter of fact, unless the appearances are thought to be necessarily harmless from the standpoint of public order or morality. (See *People v. Pesky*, 254 N. Y. 373; *People v. Wendling*, 258 N. Y. 451; *People v. Streep*, 264 N. Y. 666; *People v. Berg*, 269 N. Y. 514; *People v. Fellerman*, 269 N. Y. 629; *People v. Brewer*, 272 N. Y. 442; *Foy Productions Ltd. v. Graves*, 278 N. Y. 498; *People v. Osher*, 280 N. Y. 793.) Never has this perception been more forcefully expressed than in this [fol. 68] sentence by Cardozo, J.: "Law accepts as the pattern of its justice the morality of the community whose conduct it assumes to regulate." (Paradoxes of Legal Science, 37.) The constitutional validity of that standard has long been established. (*United States v. Rosen*, 161 U. S. 29.) (See *United States v. Rebhuhn*, 109 F. 2d 512, 514; *Magon v. United States*, 248 F. 201, certiorari denied 249 U. S. 618.)

Under the statute, as the defendant sees it, "publication of any crime book or magazine would be hazardous." For reasons that have already been stated, we believe this assertion to be an exaggeration; but the point is of little account in any event, since "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." (*Nash v. United States*, 229 U. S. 373, 377.) A recent illustration comes readily to hand: An occupier of land who by his use of it does an unreasonable injury to his neighbor's property can be held to answer therefor, though he may have been guilty of no more than an error of judgment. (*Dixon v. New York Trap Rock Corp.* 293 N. Y. 509.) So when reasonable men may fairly classify a publication as necessarily or naturally indecent or obscene, a mistaken

view by the publisher as to its character or tendency is immaterial.

In anticipation perhaps of what we have already said, the defendant lastly argues for a fresh conception of freedom of the press under which the heretofore accepted requirements of decency would no longer be operative against obscene publications. We see no immediate necessity for announcing so radical a departure from the collective reasoning of our ancestors, a position whereof we think ourselves to be assured by the following words of the highest court in the land: "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise a constitutional problem. These include the lewd and obscene, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (*Chaplin v. New Hampshire*, 315 U. S. 568, 571-572. See the cases there cited and 2 Cooley on Constitutional Limitations (8th ed.), 886, 1328.)

The judgment should be affirmed.

#### DISSENTING OPINION

LEHMAN, Ch. J., (dissenting):

I dissent on the ground that the statute, as construed by the court, is so vague and indefinite as to permit punishment of the fair use of freedom of speech. (*Stromberg v. California*, 283 U. S. 359.) Though statutes directed against "obscenity" and "indecentcy" are not too vague when limited by judicial definition, they may be too vague when not so limited. (See *McJunkins v. State*, 10 Ind. 140; *Jennings v. State*, 16 Ind. 335.) It is the function of the Legis-

lature to define the kind of conduct which is harmful from the standpoint of public order or morality and should be prohibited. Then the question whether the conduct of a defendant falls within that definition may be one of fact. The morality of the community does not, however, become the standard of permissible conduct until the Legislature has embodied its conception of that morality in a regulatory statute.

[fol. 70] Judgment should be reversed.

Lewis, Conway, Desmond, Thacher and Dye, JJ., concur with Loughran, J., Lehman, Ch. J., dissents in opinion.

Judgment affirmed.

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[fol. 71] IN COURT OF SPECIAL SESSIONS OF CITY OF NEW YORK

JUDGMENT ON REMITTITUR—July 27, 1945

Endorsement on Original Information

Judgment of this Court affirmed by Court of Appeals. Judgment of Court of Appeals made judgment of this Court.

William R. Bayes, Presiding Justice.

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[fol. 72] IN THE SUPREME COURT OF THE UNITED STATES

PEOPLE OF THE STATE OF NEW YORK, Appellee,

against

MURRAY WINTERS, Defendant-Appellant

PETITION FOR APPEAL

To the Chief Judge of the Court of Appeals of the State of New York:

Your petitioner, Murray Winters, by Arthur N. Seiff, his attorney, appellant in the above action, respectfully shows:

This prosecution was brought in a Court of Special Sessions of the City of New York, New York County, against the defendant petitioner charging him with a vio-

lation of Section 1141 Penal Law. The information against him based on sub. 1 was dismissed. He was convicted under sub. 2. Upon the trial the defendant urged that Section 1141, sub. 2 was unconstitutional under the Federal constitution in that it abridged the freedom of publication and that it was indefinite and uncertain. That challenge was overruled by the trial court. A subsequent appeal to the Appellate Division, First Department, based on the challenged invalidity of the statute resulted in an affirmance on May 19, 1944. An appeal was taken to the Court of Appeals. On July 19, 1945 that Court affirmed the conviction by a divided vote, the Chief Judge voting for reversal on the ground that the statute was unconstitutional. It ordered by its remittitur that the record in said Court be remitted to the Court of Special Sessions to be proceeded upon according to law.

Thereafter on the 27th day of July, 1945, the said Court of Special Sessions made and entered in the office of the [fol. 73] Clerk of said Court a final judgment making the judgment of the Court of Appeals the judgment of said Court of Special Sessions.

In accordance with Section 237 (a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the cause is one in which under legislation in force when the Act of January 31, 1928 was passed, to wit, under Section 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States by appeal, as a matter of right.

The defendant at all stages of the prosecution challenged the validity of the statute under which he was charged as being repugnant to the Federal constitution. The decision of the Court of Appeals, being the highest Court in which a decision in this prosecution can be had, held that the statute was not repugnant as challenged and was valid.

The errors upon which petitioner claims to be entitled to an appeal are more fully set forth in the assignment of errors filed herewith pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States, and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for an allowance of an appeal from the Court of Special Sessions of the City of New York, County of New York, which has possession of the record of all proceedings herein and wherein was entered said final judgment affirming the conviction, to the Supreme Court of the United States entered pursuant thereto in order that said decision of the Court of Appeals and of the judgment of the Court of Special Sessions entered pursuant thereto may be examined and reversed, and also [fol. 74] prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Court of Special Sessions, aforesaid, under his hand, and seal of said Court may be sent to the Supreme Court of the United States as provided by law, and that an order be made touching the security required of the petitioner, and that the bond tendered by the petitioner be approved.

Dated: August 27, 1945.

Murray Winters, by Arthur N. Seiff, Attorney for Defendant-Appellant, Office & P. O. Address 60 Wall Street, Borough of Manhattan, City of New York.

[fol. 75] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

#### ASSIGNMENTS OF ERROR

The appellant above named assigns the following errors in the record of proceedings in this cause:

The Court of Appeals of the State of New York erred:

1. In holding that Section 1141 sub. 2 Penal Law of the State of New York does not deprive appellant of his liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

2. In refusing to hold that the said statute violates appellant's rights of freedom of speech and press under the Fourteenth Amendment of the Constitution of the United States.

3. In refusing to hold that the said statute as applied to appellant denies him his rights of freedom of speech and press under the Fourteenth Amendment of the Constitution of the United States.



4. In refusing to hold that the said statute is so indefinite and uncertain as to deny appellant his liberty without due process of law under the Fourteenth Amendment of the Constitution of the United States.

5. In refusing to hold that the magazines possessed by the appellant were not a clear and imminent danger to the welfare of persons in the City of New York where they were possessed.

[fol. 76] 6. In refusing to hold that the publication possessed by appellant was not a clear and imminent danger to readers of them.

Wherefore, on account of the errors hereinabove assigned, appellant prays that said judgment of the Court of Special Sessions of the City of New York, County of New York, dated July 27, 1945 be reversed and judgment entered in favor of appellant.

Dated: New York, — —, —.

Murray Winters, by Arthur N. Seiff, Attorney for  
Appellant, Office & P. O. Address, 60 Wall Street,  
Borough of Manhattan, City of New York.

[fol. 77] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

#### ORDER ALLOWING APPEAL

The petition of Murray Winters, the appellant in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the Court of Special Sessions of the City of New York, County of New York, having been filed with the Clerk of this Court and presented herein, accompanied by assignments of error and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final judgment dated the 27th day of July, 1945 of the Court of Special Sessions of the City of New York, County of New

York, as prayed in said petition, and that the Clerk of the Court of Special Sessions of the City of New York, County of New York, shall within forty (40) days from this date, make, and transmit to the Supreme Court of the United States under his hand and seal of said Court a true copy of the material parts of the record herein, which shall be designated by praecipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further Ordered that the appellee having waived the filing of a bond for security for costs, the furnishing of [fol. 78] same is hereby dispensed with.

Dated: September —, 1945.

— — —, Chief Judge of the Court of Appeals of the State of New York.

[fol. 79] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted].

#### STIPULATION WAIVING BOND

It Is Hereby Stipulated and Consented by the attorney for the Appellee that the furnishing of a bond by Appellant as security for costs on his appeal to the Supreme Court of the United States, as required by the Rules of the Supreme Court of the United States, is hereby waived, and that an order dispensing with same may be granted without further notice.

Dated: August 22, 1945.

Frank S. Hogah, District Att'y per Richard G. Deuzer, A. D. A. Attorney for Appellee.

[fois: 80-82] Citation in usual form showing service omitted in printing.

[fol. 83] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

#### STIPULATION AS TO EXHIBITS

It Is Hereby Stipulated and Agreed by and between the undersigned that People's Exhibits 1, 2 and 3, and defendant-appellant's Exhibit A, which relate to the first three

counts of the Information as to which the defendant was acquitted, need not be printed, and that People's Exhibits 4 and 5 and defendant-appellant's Exhibit B for identification which consist of voluminous printed matter being magazines and a catalog, need not be printed but may be submitted to the Court on the argument or submission of this appeal.

Dated: New York, New York, November 15, 1945.

Frank S. Hogan, District Attorney, by Whitman Knapp. Arthur N. Seiff, Attorney for Defendant-Appellant.

[fol. 84] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It Is Hereby Stipulated and Agreed by and between counsel for the respective parties hereto, that the following are the necessary papers in this action to be included in the transcript of the record to be certified and filed with the Clerk of the Supreme Court of the United States:

- 1) The entire record in the Court of Appeals.
- 2) Remittitur of the Court of Appeals dated July 19, 1945, and its amendment.
- 3) Opinion of the Court of Appeals.
- 4) Judgment of the Court of Special Sessions dated July 27, 1945.
- 5) Petition for an allowance of appeal.
- 6) Assignment of Errors.
- 7) Order allowing appeal.
- 8) Stipulation waiving filing of a bond for security for costs.
- 9) Statement under Rule 12 of the Rules of the Supreme Court of the United States.
- 10) Proof of service of Petition for appeal, Assignment of Errors, Statement under Rule 12, and Order allowing appeal, together with a statement calling appellee's attention to paragraph 3 of Rule 12.

- 11) Citation on appeal with proof of service.
- 12) Stipulation as to Exhibits.
- 13) This stipulation.

Dated: New York, New York, November 15, 1945.

Frank S. Hogan, District Attorney by Whitman  
Knapp. Arthur N. Seiff, Attorney for Defendant-  
Appellant.

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[fol. 85] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 86] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION  
OF RECORD—Filed December 5, 1945

Comes now appellant pursuant to Paragraph 9 of Rule 13 of the Rules of this Court and adopting his Assignment of Errors, as his Statement of Points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of said points.

Dated: New York, New York, Nov. 15, 1945.

Arthur N. Seiff, Attorney for Defendant-Appellant.  
Office & P. O. Address, 60 Wall Street, Borough of  
Manhattan, City of New York.

Service of a copy of the foregoing is acknowledged this day of November 15, 1945. . .

Frank S. Hogan, District Attorney, New York  
County, by Whitman Knapp.

[fol. 86a] [File endorsement omitted.]

[fol. 87] SUPREME COURT OF THE UNITED STATES

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION  
OF JURISDICTION—January 2, 1946

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits.

Mr. Justice Jackson took no part in the consideration of this question.

Endorsed on Cover: File No. 50,339. New York. Court of Special Sessions of the City of New York. Term No. 636. Murray Winters, Appellant, vs. The People of the State of New York. Filed December 3, 1945. Term No. 636 O. T. 1945.

(2634)



